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ENERGY AND ENVIRONMENT UPDATE **November 11, 2012**

Energy and Climate Debate

Campaign season came to a close last Tuesday with President Obama winning a decisive electoral victory, Senate Democrats increasing their margin in the upper chamber, and Republicans maintaining control over the House of Representatives.

With the overall makeup of the Executive and Legislative branches of government remaining the same, we can expect to see continued partisan gridlock on some issues as leaders from both parties attempt to move toward consensus on others. The election will impact key energy and environmental issues in both the lame duck session of the 112th Congress and in the 113th Congress next year, as well as the approach and direction the administration takes on the same issues.

During his victory speech late Tuesday night, President Obama said that he wants to build a country that is not “threatened by the destructive power of a warming planet.” Additionally, a poll released last week by the American Council on Renewable Energy and the Advanced Energy Economy Ohio Institute concluded that the majority of voters in the swing states Iowa, Colorado, Virginia, and Ohio cited energy as a very important issue in determining who to vote for in the presidential election, though the poll found that voters saw President Obama’s stance as slightly more appealing than Governor Romney’s.

President Obama’s reelection green lights a series of Environmental Protection Agency air pollution and greenhouse gas rules. After holding tight during the height of the campaign season, the Environmental Protection Agency is expected to begin releasing its queue of pending air pollution regulations in the coming weeks and months. The agency is under court-ordered deadlines to finalize particulate matter standards by December 14 and air toxics standards for cement kilns by December 20. Additionally, the agency sent a proposed final rule to revise mercury and air toxics standards for new power plants to the White House for interagency review last week; the agency is on track to issue a final rule by March. Final air toxics standards for boilers are also expected to be released shortly – the Office of Management and Budget has been reviewing the final standards for boilers and incinerators since May 17 – and proposed Tier 3 vehicle and gasoline standards to lower sulfur content are overdue. New source performance standards for greenhouse gas emissions from new power plants are expected to be finalized next year, and more aggressive regulation of coal ash is also on the near-term agenda, as is a tougher national ambient air quality standard for ozone, and a myriad of other issues. House Republicans are likely to continue pushing back against Environmental Protection Administration regulations, but the divided Congress most likely means that opponents of agency action will be unable to pass legislation restraining the agency’s regulatory authority.

Significant forward movement on energy and climate issues may need to wait until after the lame duck session is over, however, as Congress and the administration will be focused on addressing the critical issue of the fiscal cliff. Though President Obama and House Speaker John Boehner (R-OH) have talked of compromise, both have drawn lines in the sand that may make reaching an agreement difficult. Energy items that may be wrapped into a negotiated fiscal cliff agreement include the production tax credit, targeted energy efficiency language, the energy title of the Farm Bill, and the Navy's use of biofuels as part of Defense Reauthorization.

Congress

Energy and Commerce Leadership

House Energy and Commerce Committee Chairman Fred Upton (R-MI) will continue to chair the panel in the 113th Congress. Representative Henry Waxman (D-CA), the senior Democrat on the committee, will return to his role of ranking member. Congressman Waxman has written to Representative Upton 17 times since March 2011 requesting hearings on the relationship of climate change to extreme weather-related disasters, while Representative Upton has called for eliminating subsidies for renewable energy and fossil fuels as part of an overall tax reform package, and plans for the committee to continue its focus on jobs and the economy and affordable energy.

Coal Ash Legislation

Senator John Hoeven (R-ND) intends to advance legislation during the lame duck session establishing a framework for coal ash regulation and preventing the Environmental Protection Agency from regulating the material as a hazardous waste. The Coal Ash Recycling and Oversight Act of 2012 (S. 3512) would establish a state permitting program for regulating coal ash from power plants under a section of the Resource Conservation and Recovery Act. Coal ash language is favored heavily in the House.

Natural Resources Plans

The House Natural Resources Committee is expected to renew legislation for onshore and offshore energy development in 2013 as well as lay the groundwork for reform of the Endangered Species Act. Leadership changes on the committee are possible, with current Chairman Doc Hastings (R-WA) potentially departing for chairmanship of the House Rules Committee.

Energy and Natural Resources Expectations

With Senator Jeff Bingaman's (D-NM) retirement, Senator Ron Wyden (D-OR) will assume the chairmanship of the Senate Energy and Natural Resources Committee for the 113th Congress. Senator Lisa Murkowski (R-AK) will remain in her role as ranking member, and the two have already begun a mutual effort to restore a bipartisan spirit on the committee. Congress has not passed a major energy bill since 2007, and Senators Wyden and Murkowski are likely to focus on targeted measures upon which they can build a consensus for action, rather than broader legislative packages.

U.S. Exemption to EU ETS Airline Regs

The House will likely pass legislation on November 13 that will bar the European Union from forcing U.S. airlines to comply with its carbon dioxide Emissions Trading System. Though the chamber has already approved legislation on the matter (H.R. 2594), the previous House legislation lacked a provision in the Senate version of the bill that called for a global agreement on air emissions. The European Commission is expected to put a year-long hold on its scheme for non-EU airlines this week.

Renewables Challenged

Senator David Vitter (R-LA), presumptive ranking member of the Senate Environment and Public Works Committee, accused the Obama Administration of favoring renewable energy over traditional forms of energy in a November 9 letter to Interior Secretary Ken Salazar. The letter also requested information from the Interior Department regarding the effective royalty rate to be paid by NRG Blue Water Wind on its 450 MW wind farm off the coast of Delaware.

Upcoming Hearings

The Senate Environment and Public Works Committee will hold a hearing November 15 on the Resources Development Act.

The House Science, Space, and Technology Committee will hold a hearing November 15 on the U.S. Antarctic program.

Administration

MATS to OMB

The White House Office of Management and Budget received a proposed rule from the Environmental Protection Agency November 7 that would revise mercury and air toxics limits issued in December 2011 for newly built power plants. The interagency review is typically the last step before a rule is publicly released, and the agency is expected to issue the final rule by March 2013.

Department of Energy

Small Business Problems

The Department of Energy's inspector general released a report November 9 chiding the agency's small business technology grants because of complaints about conflict of interest, grant application delays, and erroneous expenses.

CSP Funding Management Fine

The Energy Department's inspector general released a report November 6 finding no material concerns with the management of nearly \$75 million in funding granted by the Concentrating Solar Power Program. The paper, *Audit Report: Implementation of the Department of Energy's Concentrating Solar Power Program*, concluded that the program aims to increase CSP's cost competitiveness, and awarded \$24.1 million in Recovery Act funding and \$50 million in department or baseload funding to advance the technology.

Department of Interior

Oil Shale and Tar Sands Leasing

The Bureau of Land Management and the Interior Department released a final programmatic environmental impact statement November 9 in which they proposed offering about 807,000 acres for commercial oil shale and tar sands research and development leasing in Colorado, Utah, and Wyoming. The plan is similar to the draft the agencies released in February, and a review period ends December 10.

Solar Lawsuit Dismissed

The U.S. District Court of the Central District of California dismissed a lawsuit November 5 alleging the Interior Department failed to adequately weigh the impacts that a utility-scale solar facility under construction in the Mojave Desert would have on the desert tortoise population and avian species. Western Watersheds Project claimed that the government violated the National Environmental Policy Act, the Federal Land Policy and Management Act, and the Endangered Species Act when it approved BrightSource Energy's \$2.1 billion Ivanpah Solar Energy Generating Station.

Environmental Protection Agency

Gold Suit

A federal appeals court denied environmentalists' bid November 9 for broader pollution restrictions under the Environmental Protection Agency's regulation of hazardous air pollution at gold mines. Environmentalists contended in *Desert Citizens against Pollution and Sierra Club v. EPA* that by regulating one pollutant at the mines, like mercury, the agency must regulate other hazardous air pollutants listed under the Clean Air Act, and that it wrongly excluded fugitive air emissions.

Response to TX Objection Forthcoming

The Environmental Protection Agency agreed last week to respond by January 15 to a petition asking the agency to object to a Clean Air Act permit issued by Texas regulators to a Luminant Generation coal-fired power plant. The agency agreed to the deadline in a proposed consent decree reached in a lawsuit filed by the Environmental Integrity Project, the Sierra Club, and the Texas Campaign for the Environment. The plaintiffs asked the agency to object to the permit because it incorporated by reference a Texas Control Standard Permit, and asked the agency to object to or reopen the permit on the grounds that it did not include maximum achievable control technology limits for hazardous air pollutant emissions from the power plant as required by the Clean Air Act.

Ethanol Blending Mandates

Ethanol industry representatives speculated November 9 that the Environmental Protection Agency will likely miss its November 13 deadline to reply to requests from states for a reduction in the volume of ethanol that must be blended into gasoline for 2012. The ethanol industry also awaits the agency's ethanol blending volume mandates under the 2013 renewable fuels standard. The Energy Independence and Security Act calls for 16.55 billion gallons of ethanol to be blended into the gasoline supply in 2013.

Fracking Safety Concerns

The Environmental Protection Agency plans to release a progress report in December on its study of the potential threat of fracking to the safety of drinking water. The agency continues to work on an advance notice of proposed rulemaking so that it may collect public input on whether companies should be obligated to report fracking chemicals via the reporting system put in place by the Toxic Substances Control Act.

International Trade Commission

Solar Trade Case

The International Trade Commission unanimously voted November 7 to allow the Commerce Department to issue antidumping and countervailing duties on imports of Crystalline Silicon PV cells and modules from China. The duties will not apply retroactively to goods that entered the United States prior to the date of publication in the Federal Register of the Department of Commerce's affirmative preliminary determinations.

Nuclear Regulatory Commission

Nuclear Hearing Denied

The Nuclear Regulatory Commission denied November 8 a request by Friends of the Earth and the Natural Resources Defense Council to require Southern California Edison to undergo a formal hearing before restarting the two-unit San Onofre nuclear power plant. The commission referred the issue to the Atomic Safety and Licensing Board and to its technical staff for review and recommendations, but left open the possibility of a future hearing. A public hearing to discuss a restart proposal is scheduled for November 16.

International

\$500 Million for Developing Countries' Climate Efforts

The Climate Investments Funds – the Clean Technology Fund and the Strategic Climate Fund – recently allocated \$500 million to finance climate resilience and disaster preparedness, carbon offsets, and clean technologies in developing countries. The funds, which are worth \$7.2 billion, are coordinated by the World Bank and governed by representatives of multilateral development banks and developed and developing countries.

Extreme Weather Climate Concerns

International Energy Agency Executive Director Maria van der Hoeven said November 8 that tens of billions of dollars in damage inflicted on the East Coast by Hurricane Sandy demonstrates that countries must adapt their energy systems and infrastructures to climate change. Extreme weather threatens such

areas as electricity transmission, gasoline delivery, and communication and transportation systems that rely on energy.

Europe Investigates Chinese Solar Imports

The European Commission launched an investigation November 8 into Chinese solar panel imports to determine if manufacturers are benefiting from illegal subsidies. The move comes less than a week after the Chinese government filed similar complaints against European Union-produced solar panels exported to China. The investigation is separate from a September EU antidumping inquiry into Chinese imports.

Chinese Environmental Protection Law

China's Ministry of Environmental Protection called October 31 for significant changes to Environmental Protection Law revisions that it was instrumental in drafting. The open letter raised 34 objections to the draft and proposed additions like a double punishment mechanism that would penalize businesses and their leaders for environmental infractions, and language regarding liability insurance requirements, public interest litigation, environmental impact statements, emission and discharge permits, market-based mechanisms for addressing pollution, and rules on public disclosure of pollution information.

Australia Amenable to Post-Kyoto Target

The Australian Government announced November 9 that under certain conditions the country is willing to agree to a new greenhouse gas emissions reduction target during the upcoming Conference of Parties climate negotiations in Qatar. Australia would agree to a new Kyoto Protocol commitment that matches its current domestic target: a 5 percent cut in emissions by 2020 when compared to a 2000 baseline.

HFC Phase Out

Due to opposition from developing countries, it is unlikely that proposals to amend the Montreal Protocol to phase out the consumption and production of hydrofluorocarbons will pass during an upcoming Meeting of Parties to the agreement in Geneva. A joint proposal to phase out HFCs from the United States, Canada, and Mexico and a second proposal submitted by the Federated States of Micronesia will be discussed during the meeting, which begins November 12.

Malaysian Court Allows Production at Rare Earth Facility

A Malaysian High Court in the eastern state of Pahang denied a petition by environmental groups to put an injunction on Australian mining company Lynas Corporation's temporary operating license. The ruling will allow Lynas Corp. to begin work at its \$800 million rare earth production facility. Lynas' plant is one of the largest rare earth processing facilities outside of China.

States

WA Global Reporting Framework

The Washington Department of Ecology became the first state agency in the United States last week to publish a Global Reporting Initiative sustainability report. More than 80 percent of the world's largest companies are reporting on sustainability performance using the guidelines.

CA Clean Energy Jobs

California voters approved, 60.1 to 39.9 percent, Proposition 39 November 6 to provide revenue for energy efficiency and clean energy programs and money for the state's general fund. The measure requires multistate companies to apportion their income to California based only on sales. Under the law, which takes effect this January, half of the estimated \$1 billion in annual revenue will be used for energy efficiency and clean energy programs like retrofitting school and government buildings; the rest will go to the state's general fund.

MI RES Defeated

Michigan voters defeated Proposal 3 November 6 by an almost 2-1 margin. The constitutional amendment would have required state utilities to generate 25 percent of their power from renewable sources by 2025. Supporters of the ballot proposal, including environmental groups and some unions,

contended that it would have created jobs and helped the environment, while opponents charged that it would result in higher electric bills and job losses.

CA Cap-and-Trade Allowance Auction

The California Air Resources Board will tender 62 million greenhouse gas emissions allowances during its November 14 auction. 23.1 million of the auctioned allowances will be applicable to compliance requirements through 2020 while another 39.5 million will be valid only for 2015-2020 obligations. California's cap-and-trade program, which begins January 1, will cover 350 businesses with 600 facilities. Details about the auction, including the list of qualified bidders, the number of allowances sold, and the settlement price, will be released November 19. CARB has set the floor price for the allowances at \$10/MT and estimates that the auction will raise approximately \$600 million.

Miscellaneous

Real Estate EE Investment Slowing

Jones Lang LaSalle released a report November 6 finding that the pace of U.S. commercial real estate investment in energy efficiency upgrades is slowing. According to the survey, *Global Sustainability Perspective*, 78 percent of building owners plan to perform upgrades over the next two years, compared to 91 percent who spent money on sustainability improvements in the past two years; the slower pace is due to a perception that investments will not contribute to the bottom line.

Election Outcome Perceptions

The American Petroleum Institute released the results of a public opinion poll November 8 showing that 73 percent of voters favor increased access to U.S. oil and gas resources, 91 percent believe more oil and gas development would lead to more jobs, and 86 percent believe it would reduce consumer energy costs. The League of Conservation Voters conducted a poll November 4-6 in 11 battleground states concluding that voters remain supportive of renewable energy development and government involvement.

NRDC Election Report

The Natural Resources Defense Council Action Fund released the results of a poll November 7 concluding that money spent attacking President Obama and Democrats over coal, the Keystone XL pipeline, and Solyndra had little impact on election outcomes.

Climate Point of No Return

PricewaterhouseCoopers released a report last week finding that the global economy has already passed the critical threshold beyond which the most harmful impacts of climate change are inevitable. Scientists say that the tipping point will come once the average temperature of the atmosphere rises by 2 degrees Celsius. That could be staved off if economies began immediately reducing CO2 emissions by 5.1 percent annually, compared to the current rate of 0.7 percent, which is politically difficult.

Court Rejects Challenge to FHFA Directive

The U.S. Court of Appeals for the Eleventh Circuit ruled November 9 that a 2010 Federal Housing Finance Agency directive regarding the financing of local clean energy programs by Fannie Mae and Freddie Mac is not tantamount to a rulemaking that can be challenged in court. The 2010 FHFA directive advised Fannie Mae and Freddie Mac to avoid extending loans with first liens through Property Assessed Clean Energy Programs designed to promote the use of cleaner and more efficient energy. The ruling follows a decision by Second Circuit which similarly dismissed a challenge to the FHFA's directive.

Climate Change's Global Security Implications

The National Research Council released a report November 9 predicting that climate change will have global security implications within the next decade. The report, *Climate and Social Stress: Implications for Security Analysis*, concluded that the increasing regularity and intensity of climate events will decrease the ability of societies to endure and respond to them. The report noted several factors that influence the extent to which climate change can result in societal conflict, including the state of pre-existing social and political stresses; the immediate impacts of the climate event; and the demographic profiles of exposed populations and their coping capacities.

Environmental Groups Revisit Carbon Tax

Democratic successes in last week's elections have encouraged environmental groups to consider advocating for more aggressive action on climate change, including renewed interest in a proposal to tax the carbon content of fuel. As negotiations regarding the fiscal cliff's automatic tax hikes and spending cuts begin, some see an opportunity to propose carbon taxes as a potential source of revenue for the government, though the Administration has indicated that they will not pursue a carbon tax during negotiations. According to analysts' predictions, a carbon tax could raise between \$80 billion and \$90 billion in its first year.